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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

JANE DOE, an individual using a pseudonym,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., RASIER,
LCC, RASIER CA, LLC,

Defendants.

Case No. 3:19-cv-03310-JSC

**PLAINTIFF'S MOTION FOR AN
AWARD OF SANCTIONS AGAINST
UBER TECHNOLOGIES, INC. AND
ITS COUNSEL**

*Filed concurrently with DECLARATION
OF MATTHEW D. DAVIS and
PROPOSED ORDER*

**Date: March 17, 2021
Time: 9:00 a.m.
Dept.: San Francisco Courthouse,
Courtroom E – 15th Floor
Judge: Hon. Jacqueline Scott
Corley**

**Assigned to Magistrate Judge
Jacqueline Scott Corley**

Action Filed: June 12, 2019
Trial Date: September 12, 2022

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 17, 2022 at 9:00 a.m., Plaintiff JANE DOE, an individual using a pseudonym, by and through her counsel of record, will and hereby do move the Court for an award of sanctions against Defendant Uber Technologies, Inc.

This motion is made pursuant to Rule 37 of the Federal Rules of Civil Procedure and Local Rule 37 and is based on this Notice of Motion, the Memorandum of Points and Authorities that follows, the papers on file in this action, and any argument and evidence to be presented at the hearing on this Motion, and any matters that properly may come before the Court.

RELIEF SOUGHT

Assuming Defendant's Motion to Compel is denied, Plaintiff seeks an award of sanctions against Defendant Uber Technologies, Inc., its attorney of record, or both, in the amount of \$10,500. This relief is sought pursuant to Fed. R. Civ. P. 37(a)(5)(B).

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUE TO BE DECIDED

Defendants UBER TECHNOLOGIES, INC., RAISER LLC, AND RAISER-CA, LLC (collectively, "Uber") have engaged in abuse of the discovery process. If Defendants Motion to Compel is denied, the Court "*must*" award sanctions, unless "the motion was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(B) [emphasis supplied].

The issue presented is whether Defendants' Motion to Compel was substantially justified, or other circumstances exist such that an award of sanctions

1 would be unjust. The answer to both is no. The Court should grant this motion for
 2 sanctions against Uber and its counsel.

3 4 **II. RELEVANT FACTUAL BACKGROUND**

5 On November 18, 2021, this Court held a case management conference and
 6 extended until January 21, 2022, the cutoff to complete **outstanding** discovery. The
 7 Court instructed the parties that there should be no new discovery without leave of
 8 the Court:

9 Oh, the other thing is, no new discovery; right? So this is
 10 extending the discovery cutoff to complete the discovery
 11 that's been served, but no new discovery. (Exh. A to Davis
 Decl. [transcript of 11-18-2021 CMC] at 4:25-5:2.)

12 On January 20, 2022, Uber propounded RFPD no. 69, requesting all
 13 communications between Plaintiff or Plaintiff's representatives and any third-party
 14 that discuss, attach, forward, or otherwise mention any evidence produced in this
 15 case. (Exh. B to Feldbein-Vinderman Decl.) It propounded this request without
 16 seeking an order of the Court for good cause shown. If Plaintiff was obligated to
 17 respond, a response would be due on February 22. *See* Fed. R. Civ. P. 34(b)(2)(A).

18 On January 28, 2022, eight days after propounding RFPD no. 69, Uber filed its
 19 motion to compel. Uber's counsel did not meet and confer with Plaintiff's counsel
 20 before doing so. (Davis Decl. at ¶7.)

21 Uber's motion makes no effort to hide the fact that its disquietude about
 22 journalists and regulators having access to material that this Court declassified is
 23 what motivated the company to propound RFPD no. 69 and to file its motion to
 24 compel:

25 Uber's request to Plaintiff is necessitated by Plaintiff
 26 counsel's recent transmission of communications to third
 27 parties (including the media and the California Public
 Utilities Commission, Uber's California regulator),
 commenting on the evidence produced in this case. (Uber
 Opening Brief at 2:9-12.)

1 On January 30, Plaintiff's counsel sent an email to Uber's counsel asking the
 2 company withdraw its motion to compel because it was not permitted by Fed. R. Civ.
 3 P. 37, and because Uber did not meet and confer before filing it. (Exh. D to Davis
 4 Decl.) That email cautioned that Plaintiff may seek sanctions if Uber did not
 5 withdraw the motion. (Davis Decl. at ¶8.)

6 **III. ARGUMENT**

7 Assuming Defendant's Motion to Compel is denied, the Court "*must*" award
 8 sanctions, unless "the motion was substantially justified or other circumstances
 9 make an award of expenses unjust," in which case it cannot award sanctions. Fed. R.
 10 Civ. P. 37(a)(5)(B) [emphasis supplied]. Courts generally construe "substantially
 11 justified" to mean "justified to a degree that could satisfy a reasonable person." *Pierce*
 12 *v. Underwood*, 487 U.S. 552, 565 (1988). The losing party's decision to seek the
 13 motion to compel is substantially justified if it raises a "genuine dispute." *See id.* The
 14 "other circumstances" that would "make an award of expenses unjust" are left to
 15 judicial discretion, but may include circumstances in which the prevailing party acts
 16 unjustifiably. *See* Fed. R. Civ. P. 37(a) advisory committee's note (1970). Here, no
 17 genuine dispute exists, and Plaintiff has not acted unjustifiably, for several reasons
 18 which will now be discussed.

19 20 **A. Uber filed the motion to compel before any response to the 21 subject request could be due, a breach of Fed. R. Civ. P. 37.**

22 Uber's motion to compel was facially invalid. Federal Rule of Civil Procedure
 23 34 governs requests for production, and requires a party to make a written response
 24 within 30 days of service of a request. Fed. R. Civ. P. 34(b)(2)(A).

25 Federal Rule of Civil Procedure 37 governs motions to compel, and authorizes
 26 a motion to compel a document production only after a responding party fails to
 27 respond to a request, or responds improperly, or fails to produce documents
 28 requested under Rule 34. Fed. R. Civ. P. 37(a)(3)(B)(iv).

1 In sum, Federal Rule of Civil Procedure 37 codifies due process principles: the
 2 rule gives the responding party the time and opportunity to respond to the RFPD in
 3 writing; the rule permits the propounding party to seek judicial relief if and when the
 4 responding party makes an improper response, or fails to provide a timely written
 5 response, or fails to produce documents when due. The rule does not permit a
 6 propounding party to move to compel production before the responding party has
 7 been given the opportunity to make a Rule 34 written response to the request.

8 Here, Uber propounded RFPD no. 69 on January 20. Per Fed. R. Civ. P.
 9 34(b)(2)(A), any response is due by February 22. Thus, Uber cannot make a motion to
 10 compel pursuant to Fed. R. Civ. P. 37(a)(3)(B)(iv) before that due date.

11 Uber nevertheless filed its motion on January 28. Uber sought extraordinary
 12 relief – an order compelling Plaintiff to produce documents before her written Rule
 13 34 response is due – without even citing Federal Rule of Civil Procedure 37. The
 14 motion was not “substantially justified.”

15
 16 **B. Sanctions should be granted because Uber did not meet and**
 17 **confer before filing the motion to compel, in violation of FRCP**
 18 **37 and Local Rule 37.**

19 Federal Rule of Civil Procedure 37(a)(1) states: “The motion must include a
 20 certification that the movant has in good faith conferred or attempted to confer with
 21 the person or party failing to make disclosure or discovery in an effort to obtain it
 22 without court action.” Local Rule 37(a) reiterates that requirement: “Conference
 23 Between Counsel Required. The Court will not entertain a request or a motion to
 24 resolve a disclosure or discovery dispute unless, pursuant to Fed. R. Civ. P. 37,
 25 counsel have previously conferred for the purpose of attempting to resolve all
 26 disputed issues.”

27 No Rule 37 certification is included in Uber’s motion, which is unsurprising
 28 because Uber made no attempt to meet-and-confer before it filed the motion. Worse,
 Uber did not withdraw its motion in response to Plaintiff’s email explaining why the

1 motion was patently improper and could warrant sanctions. (Davis Decl. at ¶8.) Once
2 again, Uber's actions in this regard were not "substantially justified."

3
4 **C. Uber's motion sought to compel a discovery response after the
5 discovery cutoff.**

6 Not only was the motion procedurally invalid, the underlying request for
7 production is also not enforceable. At the November 18, 2021 CMC, the Court
8 extended the deadline to complete outstanding fact discovery and instructed the
9 parties that there should "no new discovery." (Exh. A to Davis Decl.) Yet Uber
10 propounded RFPD no. 69 two months later.

11 Moreover, RFPD no. 69 is untimely even absent the Court's "no new discovery"
12 instruction. The Court established new cutoff of January 21, 2022 to complete
13 outstanding discovery. (Docket no. 134.) Even if the Court had allowed Uber to
14 propound new discovery, which the Court did not, and January 21 was the new fact
15 discovery cutoff, then RFPD no. 69 is untimely and unenforceable. ***"Discovery***
16 ***requests that call for responses or depositions after the applicable discovery***
17 ***cut-off are not enforceable***, except by order of the Court for good cause shown."
18 (N.D. Cal. Civil Local Rule 37-3 [emphasis supplied].) Uber served RFPD no. 69 on
19 January 20, and, as discussed above, Plaintiff's response is not due until February
20 22, well after the January 21 cutoff. Thus, the request is not timely there is no
21 "genuine issue" about it.

22 **D. Substantively, RFPD no. 69 is objectionable and intended to**
23 **retaliate against the litigants for exercising their First**
24 **Amendment rights and to chill others from engaging in free**
25 **speech.**

26 Uber's motion to compel was intended to harass and retaliate against Plaintiff
27 and her counsel for exercising their First Amendment rights. The request seeks
28 communications between Plaintiff and Plaintiff's counsel and third parties, including
journalists and regulators, that discuss the evidence in this case. That is not a

1 request that is reasonably calculated to lead to the discovery of admissible evidence.
 2 Nor is it proportional. Uber actually admits that RFPD no. 69 and this motion are
 3 motivated by (1) the New York Times' publication of an opinion piece that quoted and
 4 discussed declassified depositions, and (2) the letter that Plaintiff's counsel sent to
 5 the CPUC, Uber's regulator in California, that revealed the de-classified evidence.
 6 (Uber Opening Brief at 2:9-12.) Neither document points to or gives rise to suspect
 7 any improper activity by Plaintiff or her counsel.

8 Uber may not like the fact that declassified evidence from this case is now in
 9 the possession of journalists and regulators, but that does not justify its patently
 10 untimely RFPD no. 69 and its unauthorized motion to compel. It is reasonable to
 11 infer that both acts were instead intended to chill First Amendment activity. Under
 12 these circumstances, Plaintiff's decision to make the instant motion is clearly
 13 justifiable, and an award of sanctions against Uber would not be "unjust."

14 In sum, Uber's motion to compel was not substantially justified, nor would an
 15 award of sanctions be unjust. Therefore, the Court should grant sanctions.

16 **E. Sanctions in the Amount of \$10,500 are Reasonable**

17 The Court may award attorney's fees and expenses reasonably incurred in
 18 opposing the motion to compel. Fed R. Civ. P. 37(a)(5)(B). Uber's abuse of the
 19 discovery process has caused Plaintiff's counsel to incur at least 14 hours responding
 20 to the motion to compel and preparing this motion for sanctions. (Davis Decl. at ¶9.)
 21 An hourly rate of \$750 for this time is reasonable. (Davis Decl. at ¶¶10, 11.)
 22 Therefore, the Court should award sanctions in the amount of \$10,500 (Davis Decl. at
 23 ¶11.)

24 ///

25 ///

26 ///

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court award
3 sanctions against Uber and its counsel in the amount of \$10,500.

4
5 Dated: February 10, 2022

WALKUP, MELODIA, KELLY & SCHOENBERGER

6
7 By: 

8 MATTHEW D. DAVIS

9 SARA M. PETERS

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11 KELSEY CONSTANTIN

12 Attorneys for PLAINTIFF JANE DOE
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CERTIFICATE OF SERVICE

Jane Doe v. Uber, et. al.

Case No. 3:19-cv-03310-JSC

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is 650 California Street, 26th Floor, City and County of San Francisco, CA 94108-2615.

On the date set forth below, I caused to be served true copies of the following document(s) described as:

PLAINTIFF'S MOTION FOR AN AWARD OF SANCTIONS AGAINST UBER TECHNOLOGIES, INC. AND ITS COUNSEL; DECLARATION OF MATTHEW D. DAVIS; PROPOSED ORDER

to:

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Julian Feldbein-Vinderman, Esq.
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ONLY BY ELECTRONIC TRANSMISSION: Only by e-mailing the document(s) to the persons at the e-mail address(es) listed based CA Rules of Court, Emergency Rules Related to COVID-19, Emergency rule 12 "Electronic Service" and on notice provided on March 12, 2020 that, during the Coronavirus (COVID-19) pandemic, this office will be working remotely, not able to send physical mail as usual, and is therefore using only electronic mail.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 10, 2022, at San Francisco, California.



Kirsten Benzien